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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. 288

MEMORIAL GARDENS ASSOCIATION, INC., GLENDALE MEMORIAL GARDENS, INC., and EVERGREEN MEMORIAL GARDENS, INC.,

Appellants,

vs.

ELBERT S. SMITH, as Auditor of Public Accounts of the State of Illinois, and EUGENE M. PRATT, as State's Attorney of the County of Peoria, State of Illinois,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

APPELLEES' MOTION TO AFFIRM THE JUDGMENT APPEALED FROM.

Appellees respectfully moved this Court to affirm the judgment of the Supreme Court of Illinois on the ground that this case does not present any substantial Federal question.

I.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

In *Daniel* v. *Farmers Ins. Co.*, 336 U. S. 220, this Court, recognizing that *ante mortem* contracts for funeral merchandise to be delivered at death are inherently so liable to abuse and so likely to result in imposition as to render constitutional legislation regulating *or prohibiting* such contracts, unanimously sustained an act of South Carolina that

> "provides that life insurance companies and their agents may not operate an undertaking business, and undertakers may not serve as agents for life insurance companies."

In language incisively pertinent to the instant case, this Court said at pages 222-3:

> "For many years South Carolina has prohibited the payment of insurance proceeds in merchandise or services. Act No. 205, S. C. Acts of 1929, p. 234; S. C. Code of 1942, §7984; Act No. 232, S. C. Acts of 1947, §65, p. 350. Possibilities of fraud, misunderstanding in valuation, and the comparatively useless character of the merchandise delivered or services rendered make respondents readily concede the desirability of this ban. Other states have similar statutes.
>
> "The South Carolina legislature might well have concluded that funeral insurance, although paid in cash, carries the same evils that are present in policies payable in merchandise or services: the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money will buy, whether or not an expensive ceremony is consistent with the needs of the survivors. Considerations which might have been influential include the likelihood of overreach on the part of insurance companies, and the possibilities of monopoly control detailed in affidavits introduced in the court below."

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Respecting the contention of appellant in that case that "the statute has no relation to elimination" of the evils toward which it was directed, the Court said at page 225:

> "This rationale did not find expression in *Liggett Co.* v. *Baldridge,* 278 U. S. 105, on which respondents rely. According to the majority in *Liggett,* 'a state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' 278 U. S. at 113. But a pronounced shift of emphasis since the *Liggett* case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, where the cases are reviewed."

Reversing the trial court's declaration that the statute was unconstitutional, the Court concluded its opinion at page 225:

> "The South Carolina statute, on its face, does not contravene the provisions of the Fourteenth Amendment. Neither does it offend the Amendment as applied to these respondents. We reverse the judgment below."

We quote, not of course as authoritative in this Court but as embodying the substance of Illinois' argument that the questions tendered by this appeal are not substantial, the following excerpts from the opinion of the Supreme Court of Illinois in this case (16 Ill. 2d 116, Appendix A to Appellant's Jurisdictional Statement). The Court said (Appendix, p. 30):

> "We do not believe that the present statute operates to prohibit plaintiffs' legitimate business. It does regulate the manner in which the business may be conducted. Practically, plaintiffs will no longer be able to collect prospective profits in advance, without furnishing adequate guarantee for performance. However, this does not prohibit the operation of this type of business."

The Court further said:

> "Plaintiffs' argument amounts to an admission that they will be unable to compete with others who sell the

~~same~~ merchandise and services at the time of actual need. However, this furnishes no reason to deny to the legislature the right to exercise the police power in the interest of the welfare by the regulation of the business of 'pre-need sales' in which all are free to engage, subject to the restrictions imposed. The public welfare need not be abrogated to enable an individual to carry on his business in the particular manner in which he has elected to proceed. The analogy which plaintiffs seek to draw between their contracts and retail sales made on the 'lay away' plan is fallacious. The 'lay away' sale contemplates performance within a relatively short period of time upon payment of the purchase price. Opportunities for fraud are negligible and remedies for nonperformance are readily available."

The court further said (Appendix, pp. 26-27):

"There can be no doubt that the act relates to a proper subject for the exercise of the police power. The public has a vital interest in the proper disposition of the bodies of its deceased members. Persons engaged in this business have been subjected to rigorous regulation specifying the place and manner in which their activities may be conducted and proscribing such activities without license or permit. This has been done, not only out of proper respect for the dead, but in the interest of public health. Such regulatory statutes have not been confined to the business of undertaking and embalming. In this State burial societies which are engaged in the business of providing burial benefits for the payment of funeral, burial or other expenses on behalf of their deceased members, are subjected to certain compulsions, including the maintenance of reserves in the form of deposits with the Director of Insurance. (Ill. Rev. Stat. 1957, chap. 73, pars. 950-963, incl.) Under the provisions of the Cemetery Care Act, (Ill. Rev. Stat. 1957, chap. 21 pars. 64.1—64.24 incl.) cemeteries within the purview of the act are required to place funds paid for 'perpetual care' in trust to guarantee performance of the obligations undertaken. In *Union Cemetery Ass'n* v. *Cooper*, 414 Ill. 2d 23, we held that act to constitute a valid exer-

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cise of the police power. In view of the provisions of the Insurance Code regulating the manner in which burial societies may conduct their business, and those of the Cemetery Care Act, exercising supervision over funds paid for the perpetual cemetery care, the provisions of the act in question requiring the deposit of funds in trust to guarantee contract performance are not unusual. There is nothing unique in requiring one who contracts for performance *in futuro* to give security for that performance. Thus, legislation requires contractors in public construction to give performance bonds, and compels insurance companies to maintain certain reserves and deposit security with administrative authorities charged with the supervision of their activities. The use of such bonds is generally accepted, and it is well settled that the insurance business is affected with a public interest and subject to control by the State in the exercise of its police power. 29 Am. Jur. p. 59, par. 22; *People ex rel. American Bankers Insurance Co.* v. *Palmer,* 363 Ill. 499, 508."

As the Supreme Court of Illinois noted, (Appendix, p. 24):

> "Plaintiffs employ salesmen on a commission basis and their commissions are due and payable at the time a contract is signed. In sales of merchandise, sales commissions average 32.1 per cent, local office salaries 3 per cent, cost of merchandise 31.3 per cent and various operational expenses 32.2 per cent of the purchase price, and the balance of .4 of 1 per cent is profit."

The average period of time between the inception of the contract and the death of the purchaser with consequent delivery of the items of funeral property involved, according to appellant itself, is 29 years.

Moreover, there is no assurance that the merchandise sold will be delivered for the price paid by the purchaser. An escalator clause may add to (or, of course, subtract from) the price of such items at the time of delivery upon the purchaser's death.

It thus appears that appellants are engaged in so precarious a venture, with cost of sales so high and operating profits so low that, for the protection of the public, Illinois, might well have categorically prohibited the enterprise as one in which appellant has no constitutional right to engage at all.

It is far too late in the day to urge that a state may not protect its gullible citizens against contracts for the sale of securities, insurance or commodity futures so improvident that loss is likely.

The truth is that appellant's business is so inherently fraught with the possibility of fraud and overreaching that the instant measure is a relatively moderate regulation of that business.

Nebbia v. *New York*, 291 U. S. 502, cited by appellant, which sustained New York's regulation of the price of milk, to the extent that that case is pertinent at all, supports Illinois rather than appellant in this case. Of course the fact that a regulation essentially reasonable may result in the inability of one subject to that regulation to continue in business does not invalidate the regulation.

There is no substantial conflict between the holding of the Supreme Court of Illinois in this case and *State of West Virginia* v. *Memorial Gardens Dev. Corp.*, not yet officially reported, 101 S. E. 2d 425, and the instant case. The West Virginia Statute required that *all* of the purchase price of appellant's items be subject to withdrawal at the time either of the death of the purchaser or his recission of the contract of purchase.

But even if West Virginia's supreme court had invalidated on federal grounds a measure identical with the instant Illinois act, it is not every diversity of pronouncements among State courts on federal questions that will render such questions substantial.

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For the reasons noted in the Illinois Supreme Court's opinion, the decision of a majority of the Supreme Court of West Virginia is so clearly wrong on its Federal grounds that it should not evoke this Court's jurisdiction.

For these reasons we respectfully submit that the appeal should be dismissed for want of any substantial federal question.

CERTIFICATE OF SERVICE.

I, William C. Wines, one of counsel for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the 26th day of August, 1959, I served copies of the foregoing Appellees' Motion to Affirm the Judgment Appealed from as follows:

By mailing five copies of said motion to

C. Sererin Buschman
900 Circle Tower
Indianapolis, Indiana

Roy P. Hull
First National Bank Bldg.
Peoria, Illinois

in duly addressed envelopes, postage prepaid.

WILLIAM C. WINES,
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Respectfully submitted,

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